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## MEMORANDUM

**To:** National Popular Vote  
**From:** Steven C. Liedel  
**Re:** House Bill 4156—National Popular Vote Interstate Compact and the Michigan Constitution  
**Date:** March 7, 2023

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### Question Presented

Does subsection (1) of section 7 of article II of the Michigan Constitution<sup>1</sup> (“**Subsection (1)**”) restrict the Michigan Legislature from enacting House Bill 4156 of 2023 (“**HB 4156**”) to enter into the National Popular Vote Interstate Compact (the “**Compact**”)?

### Brief Answer

No. Subsection (1) does not restrict the State of Michigan from entering into the Compact as provided under HB 4156 for at least three reasons:

- (1) the State of Michigan has broad authority not affected by Subsection (1) to enter into agreements with other states under Const 1963, art 3, § 5;<sup>2</sup>
- (2) the United States Constitution<sup>3</sup> vests the power in state legislatures to determine the manner in which presidential electors are selected and that authority is not restricted by Subsection (1); and
- (3) the plain text of Subsection (1) does not prohibit the State of Michigan from using the national popular vote winner in appointing presidential electors for Michigan consistent with the Compact.

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<sup>1</sup> See exhibit A for the full text of Const 1963, art 2, § 7.

<sup>2</sup> See exhibit B for the full text of Const 1963, art 3, § 5.

<sup>3</sup> See exhibit C for the full text of the relevant provision, US Const, art II, § 1, cl. 2.

## Facts

### ***Subsection (1) of Const 1963, art 2, § 7***

Subsection (1) was recently added to the Michigan Constitution when voters approved Proposal 22-2 to amend Const 1963, art 2, §§ 4 and 7<sup>4</sup>. Subsection (1) provides:

The outcome of every election in this state shall be determined solely by the vote of electors casting ballots in the election.

Under the Michigan Election Law, existing constitutional provisions altered or abrogated by a proposed constitutional amendment must be indicated on a petition proposing the amendment.<sup>5</sup> When submitted to voters, a proposed constitutional amendment must be published with the “existing provisions of the constitution which would be altered or abrogated” by the proposed amendment.<sup>6</sup> Additionally, the secretary of state is required to provide the full text of each constitutional amendment submitted to voters (including the constitutionally-mandated description of the constitutional provisions altered or abrogated) for posting in a conspicuous place in each voting precinct on election day.<sup>7</sup>

The full text of Proposal 22-2 indicated that the following 20 sections of the Michigan Constitution would be altered or abrogated by the proposal if adopted: Const 1963, art 2, §§ 4, 6, and 7; Const 1963, art 4, §§ 1 and 16; Const 1963, art 5, §§ 1 and 13; Const 1963, art 6, §§ 1, 2, 8, 23, and 26; Const 1963, art 7, §§ 3, 10, 18, 22, and 28; Const 1963, art 8, §§ 3 and 5; and Const 1963, art 9, § 6.<sup>8</sup> As detailed below, Proposal 22-2 did not alter or abrogate Const 1963, art 3, § 5.

Because Proposal 22-2 was approved by voters at the November 8, 2022 general election, Subsection (1) became part of the Michigan Constitution on December 24, 2022.

### ***HB 4156 – The National Popular Vote Compact***

HB 4156 would enact and enter the State of Michigan into the Compact, which also is known as the “Agreement Among the States to Elect the President by National Popular Vote”. The Compact would take effect and govern the appointment of electors for president and vice-

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<sup>4</sup> Subsection (1) was added to Const 1963, art 2, § 7, which relates to boards of canvassers and determinations of boards of canvassers relating to elections.

<sup>5</sup> MCL 168.482.

<sup>6</sup> Const 1963, art 12, § 2.

<sup>7</sup> MCL 168.480.

<sup>8</sup> See, <<https://www.saginawcounty.com/media/dpwjl2v0/state-proposal-22-2-full-language.pdf>> (accessed March 6, 2023).

president in participating states<sup>9</sup> when the number of states cumulatively possessing a majority of the electoral votes (currently 270 or more) have enacted the Compact.<sup>10</sup>

If HB 4156 is enacted, and the Compact is in effect in a sufficient number of states, the Compact would govern the appointment of presidential electors in Michigan. Following a presidential election and before the time set by law for the convening of presidential electors,<sup>11</sup> the board of state canvassers would be required to designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”<sup>12</sup> Then, the governor would be required to certify the appointment of the slate of electors in Michigan associated with the national popular vote winner as the presidential electors for the State of Michigan.<sup>13</sup>

### ***Const 1963, art 3, § 5—Agreements Among States***

The Compact is an agreement among states. Such agreements are specifically authorized by Const 1963, art 3, § 5, which provides, in pertinent part:

Subject to provisions of general law, **this state** or any political subdivision thereof, any governmental authority or any combination thereof **may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states**, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. [Emphasis added.]

This constitutional provision was not altered or abrogated by the adoption of Proposal 22-2.

### **Analysis**

When considering legislation like HB 4156, the Michigan Legislature is exercising its legislative power and may legislate on all matters unless specifically limited by the state or federal constitutions.<sup>14</sup> Subsection (1) does not expressly prohibit the Legislature from adopting the Compact. Nor is the Legislature implicitly restricted from adopting the Compact given the express authority under Const 1963, art 3, § 5 to enter into agreements with other states, the Legislature’s express authority under the federal constitution to determine the manner in which presidential electors are appointed, and the plain text of Subsection (1) which relates only to the

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<sup>9</sup> “States” is defined in the Compact to include the District of Columbia. HB 4156, art V.

<sup>10</sup> HB 4156, art III and IV.

<sup>11</sup> 2:00 p.m EST on the first Monday after the second Wednesday in December following a presidential election. MCL 168.47.

<sup>12</sup> MCL 168.46; HB 4156, art III.

<sup>13</sup> *Id.*

<sup>14</sup> *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 331-332; 870 NW2d 275 (2015).

determination of election results in this state by boards of canvassers, not to determinations relating to federal elections determined by ballots cast by voters in other states.

***Agreements with Other States and No Alteration or Abrogation of Const 1963, art 3, § 5.***

The Michigan Legislature has broad authority to enter into agreements with other states under Const 1963, art 3, § 5, including the Compact. Subsection (1) cannot be interpreted in a manner that restricts that constitutional authority. Had the proponents of Proposal 22-2, which added Subsection (1) to the Michigan Constitution, intended to alter or abrogate in any way the power of the state to enter into agreements with other states under Const 1963, art 3, § 5, Michigan voters would have been required to be notified of that alteration or abrogation. They were not.

Proposal 22-2 informed Michigan voters that 20 separate sections of the Michigan Constitution were altered or abrogated. Const 1963, art 3, § 5 was not one of those provisions. Proposal 22-2 did not alter or abrogate the state's authority to enter into agreements with other states under Const 1963, art 3, § 5, leaving the authority under that provision unaffected. As a result, Subsection (1) cannot now be interpreted in a manner that restricts Const 1963, art 3, § 5. In other words, Subsection (1) does not restrict the state's broad authority to enter into agreements with other states, including the Compact.

***Federal Constitution Permits Legislature to use Compact as Manner of Selecting Electors***

Subsection (1) also cannot be interpreted in a manner to restrict the federal constitutional authority of the Michigan Legislature to determine the manner in which presidential electors are selected. US Const, art II, § 1, cl. 2 is clear:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . .

This federal constitutional provision does not require or prohibit the use of any particular method for awarding the electoral votes of a state. As the United States Supreme Court has indicated:

The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [the winner-take-all rule] nor that the majority of those who exercise the elective franchise can alone choose the electors. **It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method** of effecting the object.

. . .

**“In short, the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States.” [Emphasis added.]<sup>15</sup>

Under the federal constitution, the Michigan Legislature retains the right to enact laws determining the manner in which presidential electors are selected, including pursuant to the Compact. Both the Michigan Legislature and Michigan voters, acting on their own, lack the authority to amend the federal constitution. As a result, Subsection (1) cannot be interpreted in a manner inconsistent with this federal constitutional provision.

### **Compact Not Inconsistent with Plain Text of Subsection (1)**

Subsection (1) requires that the outcome of every election in Michigan be determined solely by the vote of electors casting ballots in the election. Nothing in the text of the Compact is inconsistent with this requirement.

Unlike all other elections held in Michigan, an election for president and vice-president is not solely an election in this state. It is also an election held in 49 other states and the District of Columbia. Votes cast by electors cast in each of the states—not just in Michigan—determine the outcome of a presidential election. When voting in Michigan elections, Michigan voters actually cast votes for presidential and vice-presidential candidates, not presidential electors.<sup>16</sup>

A review of the actual text of the Compact confirms that no provision of the Compact relating to the manner of appointing presidential elections is inconsistent with or prohibited by Subsection (1).

First, if the Compact is in effect for a presidential election, each member state must determine the number of votes cast for each presidential election in each state:

Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a “national popular vote total” for each presidential slate.<sup>17</sup>

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<sup>15</sup> *McPherson v Secretary of State*, 146 US 1, 27, 35; 13 S Ct 3 (1892) (interpreting a Michigan statute).

<sup>16</sup> Under current law a vote for a candidate is considered a vote votes for the set of electors chosen by the political party of the candidate. MCL 168.45. Under the Compact, the votes for be considered a vote for the “presidential slate,” which is defined to be the group as two persons nominated as candidate for president and a candidate for vice-president. HB 4156, art

<sup>17</sup> HB 4156, art III.

This determination of the national popular vote total under the Compact is not a determination of the outcome of an election in Michigan. As a result Subsection (1) would not apply to this determination.

Second, the Compact requires a designation of a national popular vote winner:

The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”<sup>18</sup>

This designation required by the Compact is a designation of the national popular vote winner in a national presidential election, not a determination regarding the outcome of an election in this state. Accordingly, Subsection (1) does not apply to this designation.

Third, once a national popular vote winner is determined, the Compact requires the appointment of presidential electors based upon the national popular vote winner:

The presidential elector certifying official of each member state shall certify the appointment in that official’s own state of the elector slate nominated in that state in association with the national popular vote winner.<sup>19</sup>

This certification of appointment is not the determination of the outcome of an election in Michigan. As a result Subsection (1) does not apply to this certification.

Fourth, the Compact requires each member state to certify votes for each slate of presidential candidates in the state:

At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.<sup>20</sup>

Under this provision, the number of votes cast for each presidential slate in Michigan is determined solely by the vote of electors casting ballots in a Michigan election. As a result, the determination under this provision of the Compact is consistent with and not prohibited by Subsection (1).

Finally, in the event of a tie for the national popular vote winner, the appointment of electors is determined certified based upon votes cast in Michigan by Michigan electors.

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<sup>18</sup> HB 4156, art III.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.<sup>21</sup>

The certification of the appointment of presidential electors under this provision of the Compact is determined based upon the outcome of an election in Michigan and also is consistent with the requirements of Subsection (1).

Based upon the foregoing, the text of the Compact is not inconsistent with the plain text of Subsection (1). If the Compact is in effect, the results of the election for president and vice-president will continue to be determined by ballots cast by voters in this state. Those results will be reported to other states. In the event of a tie, those results will be used to determine the individuals appointed as electors in Michigan. But, under the Compact, when there is not a tie in the national popular vote the results of the national popular vote will be used to determine the appointment of presidential electors in Michigan. Such an outcome is not prohibited by Subsection (1).

This interpretation of the text of Subsection (1) is consistent with the apparent intent of Michigan voters when adopting Subsection (1) as part of Proposal 22-2. None of the information provided by the sponsor of Proposal 22-2 indicates any intent to limit the ability of the State of Michigan to adopt the Compact. With regard to Subsection (1), the sponsor, Promote the Vote 2022, indicated only that "Promote the Vote 2022 requires canvassing boards to certify election results based only on the official records of votes cast."<sup>22</sup> Similarly, nothing in the summary of Proposal 22-2 as it appeared on the ballot indicates any intent to alter the manner in which presidential electors are selected in Michigan or restrict the ability of the State of Michigan to enter into the Compact. The summary indicates only that Proposal 22-2 would "[r]equire canvass boards certify election results based only on the official records of votes cast."<sup>23</sup> The Compact is simply not referenced by the sponsor of Proposal 22-2 or in the full text, or official summary, of the proposal.

### Conclusion

Subsection (1) does not restrict the adoption of the Compact in Michigan because: Subsection (1) cannot be interpreted in a manner that restricts the authority of the state to enter into

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<sup>21</sup> HB 4156, art III.

<sup>22</sup> Promote the Vote, *Frequently Asked Questions*, <<https://promotethevote2022.com/frequently-asked-questions/>> (accessed March 6, 2023).

<sup>23</sup> See exhibit D for the summary of Proposal 22-2 as appearing on the ballot.

Memo to National Popular Vote  
March 7, 2023  
Page 8

agreements with other states under Const 1963, art 3, § 5; Subsection (1) cannot restrict the Michigan's Legislature's authority under the federal constitution to determine the manner in which Michigan's presidential electors are appointed; and nothing in the plain text of the Compact is inconsistent with the plain text of Subsection (1).

If questions remain regarding the constitutionality of the Compact and any restrictions imposed by Subsection (1), those questions could be addressed by the Michigan Supreme Court in an advisory opinion pursuant to Const 1963, art 3, § 8.<sup>24</sup> Under this provision, either house of the Michigan Legislature, or the governor, may request an advisory opinion on important questions of law regarding the constitutionality of legislation after its enactment but before its effective date.

I trust that this information is helpful. Please let me know if you have any questions.

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<sup>24</sup> See exhibit E for the full text of Const 1963, art 3, § 8.



**EXHIBIT A**  
Const 1963, art 2, § 7

**STATE CONSTITUTION (EXCERPT)**  
**CONSTITUTION OF MICHIGAN OF 1963**

**§ 7 Boards of canvassers, certification of election results.**

**Sec. 7. (1) The outcome of every election in this state shall be determined solely by the vote of electors casting ballots in the election.**

(2) A board of state canvassers of four members shall be established by law. No candidate for an office to be canvassed nor any inspector of elections shall be eligible to serve as a member of a board of canvassers. A majority of any board of canvassers shall not be composed of members of the same political party. The legislature may by law establish boards of county canvassers.

(3) It shall be the ministerial, clerical, nondiscretionary duty of a board of canvassers, and of each individual member thereof, to certify election results based solely on: (1) certified statements of votes from counties; or (2) in the case of boards of county canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns. The board of state canvassers is the only body or entity in this state authorized to certify the results of an election for statewide or federal office and to determine which person is elected in such election.

(4) If the certified results for any office certified by the board of state canvassers show a tie among two (2) or more persons, the tie shall be resolved and the winner certified by the drawing of lots under rules promulgated by the board of state canvassers. If the certified results for an office certified by a board of county canvassers show a tie among two (2) or more persons, the tie shall be resolved and the winner certified by such board of canvassers under procedures prescribed by law.

(5) The certification of any election results by the board of state canvassers shall be final subject only to (a) a post-certification recount of the votes cast in that election supervised by the board of state canvassers under procedures prescribed by law; or (b) a post-certification court order.

(6) A board of canvassers is authorized to conduct post-certification recounts of election results under procedures prescribed by law.

(7) For purposes of this section “to certify” means to make a signed, written statement.

**History:** Const. 1963, Art. II, § 7, Eff. Jan. 1, 1964 ;—Am. Init., approved Nov. 8, 2022, Eff. Dec. 24, 2022

**Former Constitution:** See Const. 1908, Art. III, § 9.

## EXHIBIT B

Const 1963, art 3, § 5

### STATE CONSTITUTION (EXCERPT) CONSTITUTION OF MICHIGAN OF 1963

#### § 5 Intergovernmental agreements; service by public officers and employees.

Sec. 5. Subject to provisions of general law, this state or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. Any other provision of this constitution notwithstanding, an officer or employee of the state or of any such unit of government or subdivision or agency thereof may serve on or with any governmental body established for the purposes set forth in this section and shall not be required to relinquish his office or employment by reason of such service. The legislature may impose such restrictions, limitations or conditions on such service as it may deem appropriate.

**History:** Const. 1963, Art. III, § 5, Eff. Jan. 1, 1964

**EXHIBIT C**  
US Const, art II, § 1, cl. 2  
**THE UNITED STATES CONSTITUTION (EXCERPT)**  
**ARTICLE II**

**Section 1.**

...

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

...

**EXHIBIT D**  
**Ballot Summary for Proposal 22-2**

**Proposal 22-2**

**A proposal to amend the state constitution to add provisions regarding elections.**

This proposed constitutional amendment would:

- Recognize fundamental right to vote without harassing conduct;
- Require military or overseas ballots be counted if postmarked by election day;
- Provide voter right to verify identity with photo ID or signed statement;
- Provide voter right to single application to vote absentee in all elections;
- Require state-funded absentee-ballot drop boxes, and postage for absentee applications and ballots;
- Provide that only election officials may conduct post-election audits;
- Require nine days of early in-person voting;
- Allow donations to fund elections, which must be disclosed;
- **Require canvass boards certify election results based only on the official records of votes cast.**

Should this proposal be adopted?

YES

NO

**EXHIBIT E**  
Const 1963, art 3, § 8

**STATE CONSTITUTION (EXCERPT)**  
**CONSTITUTION OF MICHIGAN OF 1963**

**§ 8 Opinions on constitutionality by supreme court.**

Sec. 8. Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

**History:** Const. 1963, Art. III, § 8, Eff. Jan. 1, 1964



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## MEMORANDUM

**To:** National Popular Vote  
**From:** Steven C. Liedel  
**Re:** House Bill 4156—National Popular Vote Interstate Compact and the Michigan Constitution  
**Date:** March 7, 2023

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### Question Presented

Does subsection (1) of section 7 of article II of the Michigan Constitution<sup>1</sup> (“**Subsection (1)**”) restrict the Michigan Legislature from enacting House Bill 4156 of 2023 (“**HB 4156**”) to enter into the National Popular Vote Interstate Compact (the “**Compact**”)?

### Brief Answer

No. Subsection (1) does not restrict the State of Michigan from entering into the Compact as provided under HB 4156 for at least three reasons:

- (1) the State of Michigan has broad authority not affected by Subsection (1) to enter into agreements with other states under Const 1963, art 3, § 5;<sup>2</sup>
- (2) the United States Constitution<sup>3</sup> vests the power in state legislatures to determine the manner in which presidential electors are selected and that authority is not restricted by Subsection (1); and
- (3) the plain text of Subsection (1) does not prohibit the State of Michigan from using the national popular vote winner in appointing presidential electors for Michigan consistent with the Compact.

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<sup>1</sup> See exhibit A for the full text of Const 1963, art 2, § 7.

<sup>2</sup> See exhibit B for the full text of Const 1963, art 3, § 5.

<sup>3</sup> See exhibit C for the full text of the relevant provision, US Const, art II, § 1, cl. 2.

## Facts

### ***Subsection (1) of Const 1963, art 2, § 7***

Subsection (1) was recently added to the Michigan Constitution when voters approved Proposal 22-2 to amend Const 1963, art 2, §§ 4 and 7<sup>4</sup>. Subsection (1) provides:

The outcome of every election in this state shall be determined solely by the vote of electors casting ballots in the election.

Under the Michigan Election Law, existing constitutional provisions altered or abrogated by a proposed constitutional amendment must be indicated on a petition proposing the amendment.<sup>5</sup> When submitted to voters, a proposed constitutional amendment must be published with the “existing provisions of the constitution which would be altered or abrogated” by the proposed amendment.<sup>6</sup> Additionally, the secretary of state is required to provide the full text of each constitutional amendment submitted to voters (including the constitutionally-mandated description of the constitutional provisions altered or abrogated) for posting in a conspicuous place in each voting precinct on election day.<sup>7</sup>

The full text of Proposal 22-2 indicated that the following 20 sections of the Michigan Constitution would be altered or abrogated by the proposal if adopted: Const 1963, art 2, §§ 4, 6, and 7; Const 1963, art 4, §§ 1 and 16; Const 1963, art 5, §§ 1 and 13; Const 1963, art 6, §§ 1, 2, 8, 23, and 26; Const 1963, art 7, §§ 3, 10, 18, 22, and 28; Const 1963, art 8, §§ 3 and 5; and Const 1963, art 9, § 6.<sup>8</sup> As detailed below, Proposal 22-2 did not alter or abrogate Const 1963, art 3, § 5.

Because Proposal 22-2 was approved by voters at the November 8, 2022 general election, Subsection (1) became part of the Michigan Constitution on December 24, 2022.

### ***HB 4156 – The National Popular Vote Compact***

HB 4156 would enact and enter the State of Michigan into the Compact, which also is known as the “Agreement Among the States to Elect the President by National Popular Vote”. The Compact would take effect and govern the appointment of electors for president and vice-

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<sup>4</sup> Subsection (1) was added to Const 1963, art 2, § 7, which relates to boards of canvassers and determinations of boards of canvassers relating to elections.

<sup>5</sup> MCL 168.482.

<sup>6</sup> Const 1963, art 12, § 2.

<sup>7</sup> MCL 168.480.

<sup>8</sup> See, <<https://www.saginawcounty.com/media/dpwjl2v0/state-proposal-22-2-full-language.pdf>> (accessed March 6, 2023).

president in participating states<sup>9</sup> when the number of states cumulatively possessing a majority of the electoral votes (currently 270 or more) have enacted the Compact.<sup>10</sup>

If HB 4156 is enacted, and the Compact is in effect in a sufficient number of states, the Compact would govern the appointment of presidential electors in Michigan. Following a presidential election and before the time set by law for the convening of presidential electors,<sup>11</sup> the board of state canvassers would be required to designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”<sup>12</sup> Then, the governor would be required to certify the appointment of the slate of electors in Michigan associated with the national popular vote winner as the presidential electors for the State of Michigan.<sup>13</sup>

### ***Const 1963, art 3, § 5—Agreements Among States***

The Compact is an agreement among states. Such agreements are specifically authorized by Const 1963, art 3, § 5, which provides, in pertinent part:

Subject to provisions of general law, **this state** or any political subdivision thereof, any governmental authority or any combination thereof **may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states**, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. [Emphasis added.]

This constitutional provision was not altered or abrogated by the adoption of Proposal 22-2.

### **Analysis**

When considering legislation like HB 4156, the Michigan Legislature is exercising its legislative power and may legislate on all matters unless specifically limited by the state or federal constitutions.<sup>14</sup> Subsection (1) does not expressly prohibit the Legislature from adopting the Compact. Nor is the Legislature implicitly restricted from adopting the Compact given the express authority under Const 1963, art 3, § 5 to enter into agreements with other states, the Legislature’s express authority under the federal constitution to determine the manner in which presidential electors are appointed, and the plain text of Subsection (1) which relates only to the

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<sup>9</sup> “States” is defined in the Compact to include the District of Columbia. HB 4156, art V.

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<sup>12</sup> MCL 168.46; HB 4156, art III.

<sup>13</sup> *Id.*

<sup>14</sup> *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 331-332; 870 NW2d 275 (2015).



determination of election results in this state by boards of canvassers, not to determinations relating to federal elections determined by ballots cast by voters in other states.

***Agreements with Other States and No Alteration or Abrogation of Const 1963, art 3, § 5.***

The Michigan Legislature has broad authority to enter into agreements with other states under Const 1963, art 3, § 5, including the Compact. Subsection (1) cannot be interpreted in a manner that restricts that constitutional authority. Had the proponents of Proposal 22-2, which added Subsection (1) to the Michigan Constitution, intended to alter or abrogate in any way the power of the state to enter into agreements with other states under Const 1963, art 3, § 5, Michigan voters would have been required to be notified of that alteration or abrogation. They were not.

Proposal 22-2 informed Michigan voters that 20 separate sections of the Michigan Constitution were altered or abrogated. Const 1963, art 3, § 5 was not one of those provisions. Proposal 22-2 did not alter or abrogate the state's authority to enter into agreements with other states under Const 1963, art 3, § 5, leaving the authority under that provision unaffected. As a result, Subsection (1) cannot now be interpreted in a manner that restricts Const 1963, art 3, § 5. In other words, Subsection (1) does not restrict the state's broad authority to enter into agreements with other states, including the Compact.

***Federal Constitution Permits Legislature to use Compact as Manner of Selecting Electors***

Subsection (1) also cannot be interpreted in a manner to restrict the federal constitutional authority of the Michigan Legislature to determine the manner in which presidential electors are selected. US Const, art II, § 1, cl. 2 is clear:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . .

This federal constitutional provision does not require or prohibit the use of any particular method for awarding the electoral votes of a state. As the United States Supreme Court has indicated:

The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [the winner-take-all rule] nor that the majority of those who exercise the elective franchise can alone choose the electors. **It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method** of effecting the object.

. . .

**“In short, the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States.” [Emphasis added.]<sup>15</sup>

Under the federal constitution, the Michigan Legislature retains the right to enact laws determining the manner in which presidential electors are selected, including pursuant to the Compact. Both the Michigan Legislature and Michigan voters, acting on their own, lack the authority to amend the federal constitution. As a result, Subsection (1) cannot be interpreted in a manner inconsistent with this federal constitutional provision.

### **Compact Not Inconsistent with Plain Text of Subsection (1)**

Subsection (1) requires that the outcome of every election in Michigan be determined solely by the vote of electors casting ballots in the election. Nothing in the text of the Compact is inconsistent with this requirement.

Unlike all other elections held in Michigan, an election for president and vice-president is not solely an election in this state. It is also an election held in 49 other states and the District of Columbia. Votes cast by electors cast in each of the states—not just in Michigan—determine the outcome of a presidential election. When voting in Michigan elections, Michigan voters actually cast votes for presidential and vice-presidential candidates, not presidential electors.<sup>16</sup>

A review of the actual text of the Compact confirms that no provision of the Compact relating to the manner of appointing presidential elections is inconsistent with or prohibited by Subsection (1).

First, if the Compact is in effect for a presidential election, each member state must determine the number of votes cast for each presidential election in each state:

Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a “national popular vote total” for each presidential slate.<sup>17</sup>

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<sup>15</sup> *McPherson v Secretary of State*, 146 US 1, 27, 35; 13 S Ct 3 (1892) (interpreting a Michigan statute).

<sup>16</sup> Under current law a vote for a candidate is considered a vote for the set of electors chosen by the political party of the candidate. MCL 168.45. Under the Compact, the votes for be considered a vote for the “presidential slate,” which is defined to be the group as two persons nominated as candidate for president and a candidate for vice-president. HB 4156, art

<sup>17</sup> HB 4156, art III.

This determination of the national popular vote total under the Compact is not a determination of the outcome of an election in Michigan. As a result Subsection (1) would not apply to this determination.

Second, the Compact requires a designation of a national popular vote winner:

The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”<sup>18</sup>

This designation required by the Compact is a designation of the national popular vote winner in a national presidential election, not a determination regarding the outcome of an election in this state. Accordingly, Subsection (1) does not apply to this designation.

Third, once a national popular vote winner is determined, the Compact requires the appointment of presidential electors based upon the national popular vote winner:

The presidential elector certifying official of each member state shall certify the appointment in that official’s own state of the elector slate nominated in that state in association with the national popular vote winner.<sup>19</sup>

This certification of appointment is not the determination of the outcome of an election in Michigan. As a result Subsection (1) does not apply to this certification.

Fourth, the Compact requires each member state to certify votes for each slate of presidential candidates in the state:

At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.<sup>20</sup>

Under this provision, the number of votes cast for each presidential slate in Michigan is determined solely by the vote of electors casting ballots in a Michigan election. As a result, the determination under this provision of the Compact is consistent with and not prohibited by Subsection (1).

Finally, in the event of a tie for the national popular vote winner, the appointment of electors is determined certified based upon votes cast in Michigan by Michigan electors.

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<sup>18</sup> HB 4156, art III.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.<sup>21</sup>

The certification of the appointment of presidential electors under this provision of the Compact is determined based upon the outcome of an election in Michigan and also is consistent with the requirements of Subsection (1).

Based upon the foregoing, the text of the Compact is not inconsistent with the plain text of Subsection (1). If the Compact is in effect, the results of the election for president and vice-president will continue to be determined by ballots cast by voters in this state. Those results will be reported to other states. In the event of a tie, those results will be used to determine the individuals appointed as electors in Michigan. But, under the Compact, when there is not a tie in the national popular vote the results of the national popular vote will be used to determine the appointment of presidential electors in Michigan. Such an outcome is not prohibited by Subsection (1).

This interpretation of the text of Subsection (1) is consistent with the apparent intent of Michigan voters when adopting Subsection (1) as part of Proposal 22-2. None of the information provided by the sponsor of Proposal 22-2 indicates any intent to limit the ability of the State of Michigan to adopt the Compact. With regard to Subsection (1), the sponsor, Promote the Vote 2022, indicated only that "Promote the Vote 2022 requires canvassing boards to certify election results based only on the official records of votes cast."<sup>22</sup> Similarly, nothing in the summary of Proposal 22-2 as it appeared on the ballot indicates any intent to alter the manner in which presidential electors are selected in Michigan or restrict the ability of the State of Michigan to enter into the Compact. The summary indicates only that Proposal 22-2 would "[r]equire canvass boards certify election results based only on the official records of votes cast."<sup>23</sup> The Compact is simply not referenced by the sponsor of Proposal 22-2 or in the full text, or official summary, of the proposal.

### Conclusion

Subsection (1) does not restrict the adoption of the Compact in Michigan because: Subsection (1) cannot be interpreted in a manner that restricts the authority of the state to enter into

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<sup>21</sup> HB 4156, art III.

<sup>22</sup> Promote the Vote, *Frequently Asked Questions*, <<https://promotethevote2022.com/frequently-asked-questions/>> (accessed March 6, 2023).

<sup>23</sup> See exhibit D for the summary of Proposal 22-2 as appearing on the ballot.

Memo to National Popular Vote  
March 7, 2023  
Page 8

agreements with other states under Const 1963, art 3, § 5; Subsection (1) cannot restrict the Michigan's Legislature's authority under the federal constitution to determine the manner in which Michigan's presidential electors are appointed; and nothing in the plain text of the Compact is inconsistent with the plain text of Subsection (1).

If questions remain regarding the constitutionality of the Compact and any restrictions imposed by Subsection (1), those questions could be addressed by the Michigan Supreme Court in an advisory opinion pursuant to Const 1963, art 3, § 8.<sup>24</sup> Under this provision, either house of the Michigan Legislature, or the governor, may request an advisory opinion on important questions of law regarding the constitutionality of legislation after its enactment but before its effective date.

I trust that this information is helpful. Please let me know if you have any questions.

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<sup>24</sup> See exhibit E for the full text of Const 1963, art 3, § 8.

**EXHIBIT A**  
Const 1963, art 2, § 7

**STATE CONSTITUTION (EXCERPT)**  
**CONSTITUTION OF MICHIGAN OF 1963**

**§ 7 Boards of canvassers, certification of election results.**

**Sec. 7. (1) The outcome of every election in this state shall be determined solely by the vote of electors casting ballots in the election.**

(2) A board of state canvassers of four members shall be established by law. No candidate for an office to be canvassed nor any inspector of elections shall be eligible to serve as a member of a board of canvassers. A majority of any board of canvassers shall not be composed of members of the same political party. The legislature may by law establish boards of county canvassers.

(3) It shall be the ministerial, clerical, nondiscretionary duty of a board of canvassers, and of each individual member thereof, to certify election results based solely on: (1) certified statements of votes from counties; or (2) in the case of boards of county canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns. The board of state canvassers is the only body or entity in this state authorized to certify the results of an election for statewide or federal office and to determine which person is elected in such election.

(4) If the certified results for any office certified by the board of state canvassers show a tie among two (2) or more persons, the tie shall be resolved and the winner certified by the drawing of lots under rules promulgated by the board of state canvassers. If the certified results for an office certified by a board of county canvassers show a tie among two (2) or more persons, the tie shall be resolved and the winner certified by such board of canvassers under procedures prescribed by law.

(5) The certification of any election results by the board of state canvassers shall be final subject only to (a) a post-certification recount of the votes cast in that election supervised by the board of state canvassers under procedures prescribed by law; or (b) a post-certification court order.

(6) A board of canvassers is authorized to conduct post-certification recounts of election results under procedures prescribed by law.

(7) For purposes of this section “to certify” means to make a signed, written statement.

**History:** Const. 1963, Art. II, § 7, Eff. Jan. 1, 1964 ;—Am. Init., approved Nov. 8, 2022, Eff. Dec. 24, 2022

**Former Constitution:** See Const. 1908, Art. III, § 9.

## **EXHIBIT B**

Const 1963, art 3, § 5

### **STATE CONSTITUTION (EXCERPT) CONSTITUTION OF MICHIGAN OF 1963**

#### **§ 5 Intergovernmental agreements; service by public officers and employees.**

Sec. 5. Subject to provisions of general law, this state or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. Any other provision of this constitution notwithstanding, an officer or employee of the state or of any such unit of government or subdivision or agency thereof may serve on or with any governmental body established for the purposes set forth in this section and shall not be required to relinquish his office or employment by reason of such service. The legislature may impose such restrictions, limitations or conditions on such service as it may deem appropriate.

**History:** Const. 1963, Art. III, § 5, Eff. Jan. 1, 1964

**EXHIBIT C**  
US Const, art II, § 1, cl. 2  
**THE UNITED STATES CONSTITUTION (EXCERPT)**  
**ARTICLE II**

**Section 1.**

...

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

...



**EXHIBIT D**  
**Ballot Summary for Proposal 22-2**

**Proposal 22-2**

**A proposal to amend the state constitution to add provisions regarding elections.**

This proposed constitutional amendment would:

- Recognize fundamental right to vote without harassing conduct;
- Require military or overseas ballots be counted if postmarked by election day;
- Provide voter right to verify identity with photo ID or signed statement;
- Provide voter right to single application to vote absentee in all elections;
- Require state-funded absentee-ballot drop boxes, and postage for absentee applications and ballots;
- Provide that only election officials may conduct post-election audits;
- Require nine days of early in-person voting;
- Allow donations to fund elections, which must be disclosed;
- **Require canvass boards certify election results based only on the official records of votes cast.**

Should this proposal be adopted?

YES

NO

**EXHIBIT E**  
Const 1963, art 3, § 8

**STATE CONSTITUTION (EXCERPT)**  
**CONSTITUTION OF MICHIGAN OF 1963**

**§ 8 Opinions on constitutionality by supreme court.**

Sec. 8. Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

**History:** Const. 1963, Art. III, § 8, Eff. Jan. 1, 1964



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## MEMORANDUM

**To:** National Popular Vote  
**From:** Steven C. Liedel  
**Re:** House Bill 4156—National Popular Vote Interstate Compact and the Michigan Constitution  
**Date:** March 7, 2023

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### Question Presented

Does subsection (1) of section 7 of article II of the Michigan Constitution<sup>1</sup> (“**Subsection (1)**”) restrict the Michigan Legislature from enacting House Bill 4156 of 2023 (“**HB 4156**”) to enter into the National Popular Vote Interstate Compact (the “**Compact**”)?

### Brief Answer

No. Subsection (1) does not restrict the State of Michigan from entering into the Compact as provided under HB 4156 for at least three reasons:

- (1) the State of Michigan has broad authority not affected by Subsection (1) to enter into agreements with other states under Const 1963, art 3, § 5;<sup>2</sup>
- (2) the United States Constitution<sup>3</sup> vests the power in state legislatures to determine the manner in which presidential electors are selected and that authority is not restricted by Subsection (1); and
- (3) the plain text of Subsection (1) does not prohibit the State of Michigan from using the national popular vote winner in appointing presidential electors for Michigan consistent with the Compact.

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<sup>1</sup> See exhibit A for the full text of Const 1963, art 2, § 7.

<sup>2</sup> See exhibit B for the full text of Const 1963, art 3, § 5.

<sup>3</sup> See exhibit C for the full text of the relevant provision, US Const, art II, § 1, cl. 2.

## Facts

### ***Subsection (1) of Const 1963, art 2, § 7***

Subsection (1) was recently added to the Michigan Constitution when voters approved Proposal 22-2 to amend Const 1963, art 2, §§ 4 and 7<sup>4</sup>. Subsection (1) provides:

The outcome of every election in this state shall be determined solely by the vote of electors casting ballots in the election.

Under the Michigan Election Law, existing constitutional provisions altered or abrogated by a proposed constitutional amendment must be indicated on a petition proposing the amendment.<sup>5</sup> When submitted to voters, a proposed constitutional amendment must be published with the “existing provisions of the constitution which would be altered or abrogated” by the proposed amendment.<sup>6</sup> Additionally, the secretary of state is required to provide the full text of each constitutional amendment submitted to voters (including the constitutionally-mandated description of the constitutional provisions altered or abrogated) for posting in a conspicuous place in each voting precinct on election day.<sup>7</sup>

The full text of Proposal 22-2 indicated that the following 20 sections of the Michigan Constitution would be altered or abrogated by the proposal if adopted: Const 1963, art 2, §§ 4, 6, and 7; Const 1963, art 4, §§ 1 and 16; Const 1963, art 5, §§ 1 and 13; Const 1963, art 6, §§ 1, 2, 8, 23, and 26; Const 1963, art 7, §§ 3, 10, 18, 22, and 28; Const 1963, art 8, §§ 3 and 5; and Const 1963, art 9, § 6.<sup>8</sup> As detailed below, Proposal 22-2 did not alter or abrogate Const 1963, art 3, § 5.

Because Proposal 22-2 was approved by voters at the November 8, 2022 general election, Subsection (1) became part of the Michigan Constitution on December 24, 2022.

### ***HB 4156 – The National Popular Vote Compact***

HB 4156 would enact and enter the State of Michigan into the Compact, which also is known as the “Agreement Among the States to Elect the President by National Popular Vote”. The Compact would take effect and govern the appointment of electors for president and vice-

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<sup>4</sup> Subsection (1) was added to Const 1963, art 2, § 7, which relates to boards of canvassers and determinations of boards of canvassers relating to elections.

<sup>5</sup> MCL 168.482.

<sup>6</sup> Const 1963, art 12, § 2.

<sup>7</sup> MCL 168.480.

<sup>8</sup> See, <<https://www.saginawcounty.com/media/dpwjl2v0/state-proposal-22-2-full-language.pdf>> (accessed March 6, 2023).

president in participating states<sup>9</sup> when the number of states cumulatively possessing a majority of the electoral votes (currently 270 or more) have enacted the Compact.<sup>10</sup>

If HB 4156 is enacted, and the Compact is in effect in a sufficient number of states, the Compact would govern the appointment of presidential electors in Michigan. Following a presidential election and before the time set by law for the convening of presidential electors,<sup>11</sup> the board of state canvassers would be required to designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”<sup>12</sup> Then, the governor would be required to certify the appointment of the slate of electors in Michigan associated with the national popular vote winner as the presidential electors for the State of Michigan.<sup>13</sup>

### ***Const 1963, art 3, § 5—Agreements Among States***

The Compact is an agreement among states. Such agreements are specifically authorized by Const 1963, art 3, § 5, which provides, in pertinent part:

Subject to provisions of general law, **this state** or any political subdivision thereof, any governmental authority or any combination thereof **may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states**, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. [Emphasis added.]

This constitutional provision was not altered or abrogated by the adoption of Proposal 22-2.

### **Analysis**

When considering legislation like HB 4156, the Michigan Legislature is exercising its legislative power and may legislate on all matters unless specifically limited by the state or federal constitutions.<sup>14</sup> Subsection (1) does not expressly prohibit the Legislature from adopting the Compact. Nor is the Legislature implicitly restricted from adopting the Compact given the express authority under Const 1963, art 3, § 5 to enter into agreements with other states, the Legislature’s express authority under the federal constitution to determine the manner in which presidential electors are appointed, and the plain text of Subsection (1) which relates only to the

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<sup>9</sup> “States” is defined in the Compact to include the District of Columbia. HB 4156, art V.

<sup>10</sup> HB 4156, art III and IV.

<sup>11</sup> 2:00 p.m EST on the first Monday after the second Wednesday in December following a presidential election. MCL 168.47.

<sup>12</sup> MCL 168.46; HB 4156, art III.

<sup>13</sup> *Id.*

<sup>14</sup> *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 331-332; 870 NW2d 275 (2015).

determination of election results in this state by boards of canvassers, not to determinations relating to federal elections determined by ballots cast by voters in other states.

***Agreements with Other States and No Alteration or Abrogation of Const 1963, art 3, § 5.***

The Michigan Legislature has broad authority to enter into agreements with other states under Const 1963, art 3, § 5, including the Compact. Subsection (1) cannot be interpreted in a manner that restricts that constitutional authority. Had the proponents of Proposal 22-2, which added Subsection (1) to the Michigan Constitution, intended to alter or abrogate in any way the power of the state to enter into agreements with other states under Const 1963, art 3, § 5, Michigan voters would have been required to be notified of that alteration or abrogation. They were not.

Proposal 22-2 informed Michigan voters that 20 separate sections of the Michigan Constitution were altered or abrogated. Const 1963, art 3, § 5 was not one of those provisions. Proposal 22-2 did not alter or abrogate the state's authority to enter into agreements with other states under Const 1963, art 3, § 5, leaving the authority under that provision unaffected. As a result, Subsection (1) cannot now be interpreted in a manner that restricts Const 1963, art 3, § 5. In other words, Subsection (1) does not restrict the state's broad authority to enter into agreements with other states, including the Compact.

***Federal Constitution Permits Legislature to use Compact as Manner of Selecting Electors***

Subsection (1) also cannot be interpreted in a manner to restrict the federal constitutional authority of the Michigan Legislature to determine the manner in which presidential electors are selected. US Const, art II, § 1, cl. 2 is clear:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . .

This federal constitutional provision does not require or prohibit the use of any particular method for awarding the electoral votes of a state. As the United States Supreme Court has indicated:

The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [the winner-take-all rule] nor that the majority of those who exercise the elective franchise can alone choose the electors. **It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method** of effecting the object.

. . .

**“In short, the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States.” [Emphasis added.]<sup>15</sup>

Under the federal constitution, the Michigan Legislature retains the right to enact laws determining the manner in which presidential electors are selected, including pursuant to the Compact. Both the Michigan Legislature and Michigan voters, acting on their own, lack the authority to amend the federal constitution. As a result, Subsection (1) cannot be interpreted in a manner inconsistent with this federal constitutional provision.

### **Compact Not Inconsistent with Plain Text of Subsection (1)**

Subsection (1) requires that the outcome of every election in Michigan be determined solely by the vote of electors casting ballots in the election. Nothing in the text of the Compact is inconsistent with this requirement.

Unlike all other elections held in Michigan, an election for president and vice-president is not solely an election in this state. It is also an election held in 49 other states and the District of Columbia. Votes cast by electors cast in each of the states—not just in Michigan—determine the outcome of a presidential election. When voting in Michigan elections, Michigan voters actually cast votes for presidential and vice-presidential candidates, not presidential electors.<sup>16</sup>

A review of the actual text of the Compact confirms that no provision of the Compact relating to the manner of appointing presidential elections is inconsistent with or prohibited by Subsection (1).

First, if the Compact is in effect for a presidential election, each member state must determine the number of votes cast for each presidential election in each state:

Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a “national popular vote total” for each presidential slate.<sup>17</sup>

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<sup>15</sup> *McPherson v Secretary of State*, 146 US 1, 27, 35; 13 S Ct 3 (1892) (interpreting a Michigan statute).

<sup>16</sup> Under current law a vote for a candidate is considered a vote for the set of electors chosen by the political party of the candidate. MCL 168.45. Under the Compact, the votes for be considered a vote for the “presidential slate,” which is defined to be the group as two persons nominated as candidate for president and a candidate for vice-president. HB 4156, art

<sup>17</sup> HB 4156, art III.

This determination of the national popular vote total under the Compact is not a determination of the outcome of an election in Michigan. As a result Subsection (1) would not apply to this determination.

Second, the Compact requires a designation of a national popular vote winner:

The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”<sup>18</sup>

This designation required by the Compact is a designation of the national popular vote winner in a national presidential election, not a determination regarding the outcome of an election in this state. Accordingly, Subsection (1) does not apply to this designation.

Third, once a national popular vote winner is determined, the Compact requires the appointment of presidential electors based upon the national popular vote winner:

The presidential elector certifying official of each member state shall certify the appointment in that official’s own state of the elector slate nominated in that state in association with the national popular vote winner.<sup>19</sup>

This certification of appointment is not the determination of the outcome of an election in Michigan. As a result Subsection (1) does not apply to this certification.

Fourth, the Compact requires each member state to certify votes for each slate of presidential candidates in the state:

At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.<sup>20</sup>

Under this provision, the number of votes cast for each presidential slate in Michigan is determined solely by the vote of electors casting ballots in a Michigan election. As a result, the determination under this provision of the Compact is consistent with and not prohibited by Subsection (1).

Finally, in the event of a tie for the national popular vote winner, the appointment of electors is determined certified based upon votes cast in Michigan by Michigan electors.

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<sup>18</sup> HB 4156, art III.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*



In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.<sup>21</sup>

The certification of the appointment of presidential electors under this provision of the Compact is determined based upon the outcome of an election in Michigan and also is consistent with the requirements of Subsection (1).

Based upon the foregoing, the text of the Compact is not inconsistent with the plain text of Subsection (1). If the Compact is in effect, the results of the election for president and vice-president will continue to be determined by ballots cast by voters in this state. Those results will be reported to other states. In the event of a tie, those results will be used to determine the individuals appointed as electors in Michigan. But, under the Compact, when there is not a tie in the national popular vote the results of the national popular vote will be used to determine the appointment of presidential electors in Michigan. Such an outcome is not prohibited by Subsection (1).

This interpretation of the text of Subsection (1) is consistent with the apparent intent of Michigan voters when adopting Subsection (1) as part of Proposal 22-2. None of the information provided by the sponsor of Proposal 22-2 indicates any intent to limit the ability of the State of Michigan to adopt the Compact. With regard to Subsection (1), the sponsor, Promote the Vote 2022, indicated only that "Promote the Vote 2022 requires canvassing boards to certify election results based only on the official records of votes cast."<sup>22</sup> Similarly, nothing in the summary of Proposal 22-2 as it appeared on the ballot indicates any intent to alter the manner in which presidential electors are selected in Michigan or restrict the ability of the State of Michigan to enter into the Compact. The summary indicates only that Proposal 22-2 would "[r]equire canvass boards certify election results based only on the official records of votes cast."<sup>23</sup> The Compact is simply not referenced by the sponsor of Proposal 22-2 or in the full text, or official summary, of the proposal.

### Conclusion

Subsection (1) does not restrict the adoption of the Compact in Michigan because: Subsection (1) cannot be interpreted in a manner that restricts the authority of the state to enter into

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<sup>21</sup> HB 4156, art III.

<sup>22</sup> Promote the Vote, *Frequently Asked Questions*, <<https://promotethevote2022.com/frequently-asked-questions/>> (accessed March 6, 2023).

<sup>23</sup> See exhibit D for the summary of Proposal 22-2 as appearing on the ballot.

Memo to National Popular Vote  
March 7, 2023  
Page 8

agreements with other states under Const 1963, art 3, § 5; Subsection (1) cannot restrict the Michigan's Legislature's authority under the federal constitution to determine the manner in which Michigan's presidential electors are appointed; and nothing in the plain text of the Compact is inconsistent with the plain text of Subsection (1).

If questions remain regarding the constitutionality of the Compact and any restrictions imposed by Subsection (1), those questions could be addressed by the Michigan Supreme Court in an advisory opinion pursuant to Const 1963, art 3, § 8.<sup>24</sup> Under this provision, either house of the Michigan Legislature, or the governor, may request an advisory opinion on important questions of law regarding the constitutionality of legislation after its enactment but before its effective date.

I trust that this information is helpful. Please let me know if you have any questions.

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<sup>24</sup> See exhibit E for the full text of Const 1963, art 3, § 8.

**EXHIBIT A**  
Const 1963, art 2, § 7

**STATE CONSTITUTION (EXCERPT)**  
**CONSTITUTION OF MICHIGAN OF 1963**

**§ 7 Boards of canvassers, certification of election results.**

**Sec. 7. (1) The outcome of every election in this state shall be determined solely by the vote of electors casting ballots in the election.**

(2) A board of state canvassers of four members shall be established by law. No candidate for an office to be canvassed nor any inspector of elections shall be eligible to serve as a member of a board of canvassers. A majority of any board of canvassers shall not be composed of members of the same political party. The legislature may by law establish boards of county canvassers.

(3) It shall be the ministerial, clerical, nondiscretionary duty of a board of canvassers, and of each individual member thereof, to certify election results based solely on: (1) certified statements of votes from counties; or (2) in the case of boards of county canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns. The board of state canvassers is the only body or entity in this state authorized to certify the results of an election for statewide or federal office and to determine which person is elected in such election.

(4) If the certified results for any office certified by the board of state canvassers show a tie among two (2) or more persons, the tie shall be resolved and the winner certified by the drawing of lots under rules promulgated by the board of state canvassers. If the certified results for an office certified by a board of county canvassers show a tie among two (2) or more persons, the tie shall be resolved and the winner certified by such board of canvassers under procedures prescribed by law.

(5) The certification of any election results by the board of state canvassers shall be final subject only to (a) a post-certification recount of the votes cast in that election supervised by the board of state canvassers under procedures prescribed by law; or (b) a post-certification court order.

(6) A board of canvassers is authorized to conduct post-certification recounts of election results under procedures prescribed by law.

(7) For purposes of this section “to certify” means to make a signed, written statement.

**History:** Const. 1963, Art. II, § 7, Eff. Jan. 1, 1964 ;—Am. Init., approved Nov. 8, 2022, Eff. Dec. 24, 2022

**Former Constitution:** See Const. 1908, Art. III, § 9.

## EXHIBIT B

Const 1963, art 3, § 5

### STATE CONSTITUTION (EXCERPT) CONSTITUTION OF MICHIGAN OF 1963

#### § 5 Intergovernmental agreements; service by public officers and employees.

Sec. 5. Subject to provisions of general law, this state or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. Any other provision of this constitution notwithstanding, an officer or employee of the state or of any such unit of government or subdivision or agency thereof may serve on or with any governmental body established for the purposes set forth in this section and shall not be required to relinquish his office or employment by reason of such service. The legislature may impose such restrictions, limitations or conditions on such service as it may deem appropriate.

**History:** Const. 1963, Art. III, § 5, Eff. Jan. 1, 1964

**EXHIBIT C**  
US Const, art II, § 1, cl. 2  
**THE UNITED STATES CONSTITUTION (EXCERPT)**  
**ARTICLE II**

**Section 1.**

...

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

...

**EXHIBIT D**  
**Ballot Summary for Proposal 22-2**

**Proposal 22-2**

**A proposal to amend the state constitution to add provisions regarding elections.**

This proposed constitutional amendment would:

- Recognize fundamental right to vote without harassing conduct;
- Require military or overseas ballots be counted if postmarked by election day;
- Provide voter right to verify identity with photo ID or signed statement;
- Provide voter right to single application to vote absentee in all elections;
- Require state-funded absentee-ballot drop boxes, and postage for absentee applications and ballots;
- Provide that only election officials may conduct post-election audits;
- Require nine days of early in-person voting;
- Allow donations to fund elections, which must be disclosed;
- **Require canvass boards certify election results based only on the official records of votes cast.**

Should this proposal be adopted?

YES

NO

**EXHIBIT E**  
Const 1963, art 3, § 8

**STATE CONSTITUTION (EXCERPT)**  
**CONSTITUTION OF MICHIGAN OF 1963**

**§ 8 Opinions on constitutionality by supreme court.**

Sec. 8. Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

**History:** Const. 1963, Art. III, § 8, Eff. Jan. 1, 1964



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## MEMORANDUM

**To:** National Popular Vote  
**From:** Steven C. Liedel  
**Re:** House Bill 4156—National Popular Vote Interstate Compact and the Michigan Constitution  
**Date:** March 7, 2023

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### Question Presented

Does subsection (1) of section 7 of article II of the Michigan Constitution<sup>1</sup> (“**Subsection (1)**”) restrict the Michigan Legislature from enacting House Bill 4156 of 2023 (“**HB 4156**”) to enter into the National Popular Vote Interstate Compact (the “**Compact**”)?

### Brief Answer

No. Subsection (1) does not restrict the State of Michigan from entering into the Compact as provided under HB 4156 for at least three reasons:

- (1) the State of Michigan has broad authority not affected by Subsection (1) to enter into agreements with other states under Const 1963, art 3, § 5;<sup>2</sup>
- (2) the United States Constitution<sup>3</sup> vests the power in state legislatures to determine the manner in which presidential electors are selected and that authority is not restricted by Subsection (1); and
- (3) the plain text of Subsection (1) does not prohibit the State of Michigan from using the national popular vote winner in appointing presidential electors for Michigan consistent with the Compact.

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<sup>1</sup> See exhibit A for the full text of Const 1963, art 2, § 7.

<sup>2</sup> See exhibit B for the full text of Const 1963, art 3, § 5.

<sup>3</sup> See exhibit C for the full text of the relevant provision, US Const, art II, § 1, cl. 2.



## Facts

### ***Subsection (1) of Const 1963, art 2, § 7***

Subsection (1) was recently added to the Michigan Constitution when voters approved Proposal 22-2 to amend Const 1963, art 2, §§ 4 and 7<sup>4</sup>. Subsection (1) provides:

The outcome of every election in this state shall be determined solely by the vote of electors casting ballots in the election.

Under the Michigan Election Law, existing constitutional provisions altered or abrogated by a proposed constitutional amendment must be indicated on a petition proposing the amendment.<sup>5</sup> When submitted to voters, a proposed constitutional amendment must be published with the “existing provisions of the constitution which would be altered or abrogated” by the proposed amendment.<sup>6</sup> Additionally, the secretary of state is required to provide the full text of each constitutional amendment submitted to voters (including the constitutionally-mandated description of the constitutional provisions altered or abrogated) for posting in a conspicuous place in each voting precinct on election day.<sup>7</sup>

The full text of Proposal 22-2 indicated that the following 20 sections of the Michigan Constitution would be altered or abrogated by the proposal if adopted: Const 1963, art 2, §§ 4, 6, and 7; Const 1963, art 4, §§ 1 and 16; Const 1963, art 5, §§ 1 and 13; Const 1963, art 6, §§ 1, 2, 8, 23, and 26; Const 1963, art 7, §§ 3, 10, 18, 22, and 28; Const 1963, art 8, §§ 3 and 5; and Const 1963, art 9, § 6.<sup>8</sup> As detailed below, Proposal 22-2 did not alter or abrogate Const 1963, art 3, § 5.

Because Proposal 22-2 was approved by voters at the November 8, 2022 general election, Subsection (1) became part of the Michigan Constitution on December 24, 2022.

### ***HB 4156 – The National Popular Vote Compact***

HB 4156 would enact and enter the State of Michigan into the Compact, which also is known as the “Agreement Among the States to Elect the President by National Popular Vote”. The Compact would take effect and govern the appointment of electors for president and vice-

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<sup>4</sup> Subsection (1) was added to Const 1963, art 2, § 7, which relates to boards of canvassers and determinations of boards of canvassers relating to elections.

<sup>5</sup> MCL 168.482.

<sup>6</sup> Const 1963, art 12, § 2.

<sup>7</sup> MCL 168.480.

<sup>8</sup> See, <<https://www.saginawcounty.com/media/dpwjl2v0/state-proposal-22-2-full-language.pdf>> (accessed March 6, 2023).

president in participating states<sup>9</sup> when the number of states cumulatively possessing a majority of the electoral votes (currently 270 or more) have enacted the Compact.<sup>10</sup>

If HB 4156 is enacted, and the Compact is in effect in a sufficient number of states, the Compact would govern the appointment of presidential electors in Michigan. Following a presidential election and before the time set by law for the convening of presidential electors,<sup>11</sup> the board of state canvassers would be required to designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”<sup>12</sup> Then, the governor would be required to certify the appointment of the slate of electors in Michigan associated with the national popular vote winner as the presidential electors for the State of Michigan.<sup>13</sup>

**Const 1963, art 3, § 5—Agreements Among States**

The Compact is an agreement among states. Such agreements are specifically authorized by Const 1963, art 3, § 5, which provides, in pertinent part:

Subject to provisions of general law, **this state** or any political subdivision thereof, any governmental authority or any combination thereof **may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states**, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. [Emphasis added.]

This constitutional provision was not altered or abrogated by the adoption of Proposal 22-2.

**Analysis**

When considering legislation like HB 4156, the Michigan Legislature is exercising its legislative power and may legislate on all matters unless specifically limited by the state or federal constitutions.<sup>14</sup> Subsection (1) does not expressly prohibit the Legislature from adopting the Compact. Nor is the Legislature implicitly restricted from adopting the Compact given the express authority under Const 1963, art 3, § 5 to enter into agreements with other states, the Legislature’s express authority under the federal constitution to determine the manner in which presidential electors are appointed, and the plain text of Subsection (1) which relates only to the

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<sup>9</sup> “States” is defined in the Compact to include the District of Columbia. HB 4156, art V.

<sup>10</sup> HB 4156, art III and IV.

<sup>11</sup> 2:00 p.m EST on the first Monday after the second Wednesday in December following a presidential election. MCL 168.47.

<sup>12</sup> MCL 168.46; HB 4156, art III.

<sup>13</sup> *Id.*

<sup>14</sup> *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 331-332; 870 NW2d 275 (2015).

determination of election results in this state by boards of canvassers, not to determinations relating to federal elections determined by ballots cast by voters in other states.

***Agreements with Other States and No Alteration or Abrogation of Const 1963, art 3, § 5.***

The Michigan Legislature has broad authority to enter into agreements with other states under Const 1963, art 3, § 5, including the Compact. Subsection (1) cannot be interpreted in a manner that restricts that constitutional authority. Had the proponents of Proposal 22-2, which added Subsection (1) to the Michigan Constitution, intended to alter or abrogate in any way the power of the state to enter into agreements with other states under Const 1963, art 3, § 5, Michigan voters would have been required to be notified of that alteration or abrogation. They were not.

Proposal 22-2 informed Michigan voters that 20 separate sections of the Michigan Constitution were altered or abrogated. Const 1963, art 3, § 5 was not one of those provisions. Proposal 22-2 did not alter or abrogate the state's authority to enter into agreements with other states under Const 1963, art 3, § 5, leaving the authority under that provision unaffected. As a result, Subsection (1) cannot now be interpreted in a manner that restricts Const 1963, art 3, § 5. In other words, Subsection (1) does not restrict the state's broad authority to enter into agreements with other states, including the Compact.

***Federal Constitution Permits Legislature to use Compact as Manner of Selecting Electors***

Subsection (1) also cannot be interpreted in a manner to restrict the federal constitutional authority of the Michigan Legislature to determine the manner in which presidential electors are selected. US Const, art II, § 1, cl. 2 is clear:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . .

This federal constitutional provision does not require or prohibit the use of any particular method for awarding the electoral votes of a state. As the United States Supreme Court has indicated:

The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [the winner-take-all rule] nor that the majority of those who exercise the elective franchise can alone choose the electors. **It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method** of effecting the object.

. . .

**“In short, the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States.” [Emphasis added.]<sup>15</sup>

Under the federal constitution, the Michigan Legislature retains the right to enact laws determining the manner in which presidential electors are selected, including pursuant to the Compact. Both the Michigan Legislature and Michigan voters, acting on their own, lack the authority to amend the federal constitution. As a result, Subsection (1) cannot be interpreted in a manner inconsistent with this federal constitutional provision.

### **Compact Not Inconsistent with Plain Text of Subsection (1)**

Subsection (1) requires that the outcome of every election in Michigan be determined solely by the vote of electors casting ballots in the election. Nothing in the text of the Compact is inconsistent with this requirement.

Unlike all other elections held in Michigan, an election for president and vice-president is not solely an election in this state. It is also an election held in 49 other states and the District of Columbia. Votes cast by electors cast in each of the states—not just in Michigan—determine the outcome of a presidential election. When voting in Michigan elections, Michigan voters actually cast votes for presidential and vice-presidential candidates, not presidential electors.<sup>16</sup>

A review of the actual text of the Compact confirms that no provision of the Compact relating to the manner of appointing presidential elections is inconsistent with or prohibited by Subsection (1).

First, if the Compact is in effect for a presidential election, each member state must determine the number of votes cast for each presidential election in each state:

Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a “national popular vote total” for each presidential slate.<sup>17</sup>

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<sup>15</sup> *McPherson v Secretary of State*, 146 US 1, 27, 35; 13 S Ct 3 (1892) (interpreting a Michigan statute).

<sup>16</sup> Under current law a vote for a candidate is considered a vote for the set of electors chosen by the political party of the candidate. MCL 168.45. Under the Compact, the votes for be considered a vote for the “presidential slate,” which is defined to be the group as two persons nominated as candidate for president and a candidate for vice-president. HB 4156, art

<sup>17</sup> HB 4156, art III.

This determination of the national popular vote total under the Compact is not a determination of the outcome of an election in Michigan. As a result Subsection (1) would not apply to this determination.

Second, the Compact requires a designation of a national popular vote winner:

The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”<sup>18</sup>

This designation required by the Compact is a designation of the national popular vote winner in a national presidential election, not a determination regarding the outcome of an election in this state. Accordingly, Subsection (1) does not apply to this designation.

Third, once a national popular vote winner is determined, the Compact requires the appointment of presidential electors based upon the national popular vote winner:

The presidential elector certifying official of each member state shall certify the appointment in that official’s own state of the elector slate nominated in that state in association with the national popular vote winner.<sup>19</sup>

This certification of appointment is not the determination of the outcome of an election in Michigan. As a result Subsection (1) does not apply to this certification.

Fourth, the Compact requires each member state to certify votes for each slate of presidential candidates in the state:

At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.<sup>20</sup>

Under this provision, the number of votes cast for each presidential slate in Michigan is determined solely by the vote of electors casting ballots in a Michigan election. As a result, the determination under this provision of the Compact is consistent with and not prohibited by Subsection (1).

Finally, in the event of a tie for the national popular vote winner, the appointment of electors is determined certified based upon votes cast in Michigan by Michigan electors.

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<sup>18</sup> HB 4156, art III.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.<sup>21</sup>

The certification of the appointment of presidential electors under this provision of the Compact is determined based upon the outcome of an election in Michigan and also is consistent with the requirements of Subsection (1).

Based upon the foregoing, the text of the Compact is not inconsistent with the plain text of Subsection (1). If the Compact is in effect, the results of the election for president and vice-president will continue to be determined by ballots cast by voters in this state. Those results will be reported to other states. In the event of a tie, those results will be used to determine the individuals appointed as electors in Michigan. But, under the Compact, when there is not a tie in the national popular vote the results of the national popular vote will be used to determine the appointment of presidential electors in Michigan. Such an outcome is not prohibited by Subsection (1).

This interpretation of the text of Subsection (1) is consistent with the apparent intent of Michigan voters when adopting Subsection (1) as part of Proposal 22-2. None of the information provided by the sponsor of Proposal 22-2 indicates any intent to limit the ability of the State of Michigan to adopt the Compact. With regard to Subsection (1), the sponsor, Promote the Vote 2022, indicated only that "Promote the Vote 2022 requires canvassing boards to certify election results based only on the official records of votes cast."<sup>22</sup> Similarly, nothing in the summary of Proposal 22-2 as it appeared on the ballot indicates any intent to alter the manner in which presidential electors are selected in Michigan or restrict the ability of the State of Michigan to enter into the Compact. The summary indicates only that Proposal 22-2 would "[r]equire canvass boards certify election results based only on the official records of votes cast."<sup>23</sup> The Compact is simply not referenced by the sponsor of Proposal 22-2 or in the full text, or official summary, of the proposal.

### Conclusion

Subsection (1) does not restrict the adoption of the Compact in Michigan because: Subsection (1) cannot be interpreted in a manner that restricts the authority of the state to enter into

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<sup>21</sup> HB 4156, art III.

<sup>22</sup> Promote the Vote, *Frequently Asked Questions*, <<https://promotethevote2022.com/frequently-asked-questions/>> (accessed March 6, 2023).

<sup>23</sup> See exhibit D for the summary of Proposal 22-2 as appearing on the ballot.

Memo to National Popular Vote  
March 7, 2023  
Page 8

agreements with other states under Const 1963, art 3, § 5; Subsection (1) cannot restrict the Michigan's Legislature's authority under the federal constitution to determine the manner in which Michigan's presidential electors are appointed; and nothing in the plain text of the Compact is inconsistent with the plain text of Subsection (1).

If questions remain regarding the constitutionality of the Compact and any restrictions imposed by Subsection (1), those questions could be addressed by the Michigan Supreme Court in an advisory opinion pursuant to Const 1963, art 3, § 8.<sup>24</sup> Under this provision, either house of the Michigan Legislature, or the governor, may request an advisory opinion on important questions of law regarding the constitutionality of legislation after its enactment but before its effective date.

I trust that this information is helpful. Please let me know if you have any questions.

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<sup>24</sup> See exhibit E for the full text of Const 1963, art 3, § 8.

**EXHIBIT A**  
Const 1963, art 2, § 7

**STATE CONSTITUTION (EXCERPT)**  
**CONSTITUTION OF MICHIGAN OF 1963**

**§ 7 Boards of canvassers, certification of election results.**

**Sec. 7. (1) The outcome of every election in this state shall be determined solely by the vote of electors casting ballots in the election.**

(2) A board of state canvassers of four members shall be established by law. No candidate for an office to be canvassed nor any inspector of elections shall be eligible to serve as a member of a board of canvassers. A majority of any board of canvassers shall not be composed of members of the same political party. The legislature may by law establish boards of county canvassers.

(3) It shall be the ministerial, clerical, nondiscretionary duty of a board of canvassers, and of each individual member thereof, to certify election results based solely on: (1) certified statements of votes from counties; or (2) in the case of boards of county canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns. The board of state canvassers is the only body or entity in this state authorized to certify the results of an election for statewide or federal office and to determine which person is elected in such election.

(4) If the certified results for any office certified by the board of state canvassers show a tie among two (2) or more persons, the tie shall be resolved and the winner certified by the drawing of lots under rules promulgated by the board of state canvassers. If the certified results for an office certified by a board of county canvassers show a tie among two (2) or more persons, the tie shall be resolved and the winner certified by such board of canvassers under procedures prescribed by law.

(5) The certification of any election results by the board of state canvassers shall be final subject only to (a) a post-certification recount of the votes cast in that election supervised by the board of state canvassers under procedures prescribed by law; or (b) a post-certification court order.

(6) A board of canvassers is authorized to conduct post-certification recounts of election results under procedures prescribed by law.

(7) For purposes of this section “to certify” means to make a signed, written statement.

**History:** Const. 1963, Art. II, § 7, Eff. Jan. 1, 1964 ;—Am. Init., approved Nov. 8, 2022, Eff. Dec. 24, 2022

**Former Constitution:** See Const. 1908, Art. III, § 9.



## EXHIBIT B

Const 1963, art 3, § 5

### STATE CONSTITUTION (EXCERPT) CONSTITUTION OF MICHIGAN OF 1963

#### § 5 Intergovernmental agreements; service by public officers and employees.

Sec. 5. Subject to provisions of general law, this state or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. Any other provision of this constitution notwithstanding, an officer or employee of the state or of any such unit of government or subdivision or agency thereof may serve on or with any governmental body established for the purposes set forth in this section and shall not be required to relinquish his office or employment by reason of such service. The legislature may impose such restrictions, limitations or conditions on such service as it may deem appropriate.

**History:** Const. 1963, Art. III, § 5, Eff. Jan. 1, 1964

**EXHIBIT C**  
US Const, art II, § 1, cl. 2  
**THE UNITED STATES CONSTITUTION (EXCERPT)**  
**ARTICLE II**

**Section 1.**

...

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

...

**EXHIBIT D**  
**Ballot Summary for Proposal 22-2**

**Proposal 22-2**

**A proposal to amend the state constitution to add provisions regarding elections.**

This proposed constitutional amendment would:

- Recognize fundamental right to vote without harassing conduct;
- Require military or overseas ballots be counted if postmarked by election day;
- Provide voter right to verify identity with photo ID or signed statement;
- Provide voter right to single application to vote absentee in all elections;
- Require state-funded absentee-ballot drop boxes, and postage for absentee applications and ballots;
- Provide that only election officials may conduct post-election audits;
- Require nine days of early in-person voting;
- Allow donations to fund elections, which must be disclosed;
- **Require canvass boards certify election results based only on the official records of votes cast.**

Should this proposal be adopted?

YES

NO

**EXHIBIT E**  
Const 1963, art 3, § 8

**STATE CONSTITUTION (EXCERPT)**  
**CONSTITUTION OF MICHIGAN OF 1963**

**§ 8 Opinions on constitutionality by supreme court.**

Sec. 8. Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

**History:** Const. 1963, Art. III, § 8, Eff. Jan. 1, 1964



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## MEMORANDUM

**To:** National Popular Vote  
**From:** Steven C. Liedel  
**Re:** House Bill 4156—National Popular Vote Interstate Compact and the Michigan Constitution  
**Date:** March 7, 2023

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### Question Presented

Does subsection (1) of section 7 of article II of the Michigan Constitution<sup>1</sup> (“**Subsection (1)**”) restrict the Michigan Legislature from enacting House Bill 4156 of 2023 (“**HB 4156**”) to enter into the National Popular Vote Interstate Compact (the “**Compact**”)?

### Brief Answer

No. Subsection (1) does not restrict the State of Michigan from entering into the Compact as provided under HB 4156 for at least three reasons:

- (1) the State of Michigan has broad authority not affected by Subsection (1) to enter into agreements with other states under Const 1963, art 3, § 5;<sup>2</sup>
- (2) the United States Constitution<sup>3</sup> vests the power in state legislatures to determine the manner in which presidential electors are selected and that authority is not restricted by Subsection (1); and
- (3) the plain text of Subsection (1) does not prohibit the State of Michigan from using the national popular vote winner in appointing presidential electors for Michigan consistent with the Compact.

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<sup>1</sup> See exhibit A for the full text of Const 1963, art 2, § 7.

<sup>2</sup> See exhibit B for the full text of Const 1963, art 3, § 5.

<sup>3</sup> See exhibit C for the full text of the relevant provision, US Const, art II, § 1, cl. 2.

## Facts

### ***Subsection (1) of Const 1963, art 2, § 7***

Subsection (1) was recently added to the Michigan Constitution when voters approved Proposal 22-2 to amend Const 1963, art 2, §§ 4 and 7<sup>4</sup>. Subsection (1) provides:

The outcome of every election in this state shall be determined solely by the vote of electors casting ballots in the election.

Under the Michigan Election Law, existing constitutional provisions altered or abrogated by a proposed constitutional amendment must be indicated on a petition proposing the amendment.<sup>5</sup> When submitted to voters, a proposed constitutional amendment must be published with the “existing provisions of the constitution which would be altered or abrogated” by the proposed amendment.<sup>6</sup> Additionally, the secretary of state is required to provide the full text of each constitutional amendment submitted to voters (including the constitutionally-mandated description of the constitutional provisions altered or abrogated) for posting in a conspicuous place in each voting precinct on election day.<sup>7</sup>

The full text of Proposal 22-2 indicated that the following 20 sections of the Michigan Constitution would be altered or abrogated by the proposal if adopted: Const 1963, art 2, §§ 4, 6, and 7; Const 1963, art 4, §§ 1 and 16; Const 1963, art 5, §§ 1 and 13; Const 1963, art 6, §§ 1, 2, 8, 23, and 26; Const 1963, art 7, §§ 3, 10, 18, 22, and 28; Const 1963, art 8, §§ 3 and 5; and Const 1963, art 9, § 6.<sup>8</sup> As detailed below, Proposal 22-2 did not alter or abrogate Const 1963, art 3, § 5.

Because Proposal 22-2 was approved by voters at the November 8, 2022 general election, Subsection (1) became part of the Michigan Constitution on December 24, 2022.

### ***HB 4156 – The National Popular Vote Compact***

HB 4156 would enact and enter the State of Michigan into the Compact, which also is known as the “Agreement Among the States to Elect the President by National Popular Vote”. The Compact would take effect and govern the appointment of electors for president and vice-

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<sup>4</sup> Subsection (1) was added to Const 1963, art 2, § 7, which relates to boards of canvassers and determinations of boards of canvassers relating to elections.

<sup>5</sup> MCL 168.482.

<sup>6</sup> Const 1963, art 12, § 2.

<sup>7</sup> MCL 168.480.

<sup>8</sup> See, <<https://www.saginawcounty.com/media/dpwjl2v0/state-proposal-22-2-full-language.pdf>> (accessed March 6, 2023).

president in participating states<sup>9</sup> when the number of states cumulatively possessing a majority of the electoral votes (currently 270 or more) have enacted the Compact.<sup>10</sup>

If HB 4156 is enacted, and the Compact is in effect in a sufficient number of states, the Compact would govern the appointment of presidential electors in Michigan. Following a presidential election and before the time set by law for the convening of presidential electors,<sup>11</sup> the board of state canvassers would be required to designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”<sup>12</sup> Then, the governor would be required to certify the appointment of the slate of electors in Michigan associated with the national popular vote winner as the presidential electors for the State of Michigan.<sup>13</sup>

### ***Const 1963, art 3, § 5—Agreements Among States***

The Compact is an agreement among states. Such agreements are specifically authorized by Const 1963, art 3, § 5, which provides, in pertinent part:

Subject to provisions of general law, **this state** or any political subdivision thereof, any governmental authority or any combination thereof **may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states**, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. [Emphasis added.]

This constitutional provision was not altered or abrogated by the adoption of Proposal 22-2.

### **Analysis**

When considering legislation like HB 4156, the Michigan Legislature is exercising its legislative power and may legislate on all matters unless specifically limited by the state or federal constitutions.<sup>14</sup> Subsection (1) does not expressly prohibit the Legislature from adopting the Compact. Nor is the Legislature implicitly restricted from adopting the Compact given the express authority under Const 1963, art 3, § 5 to enter into agreements with other states, the Legislature’s express authority under the federal constitution to determine the manner in which presidential electors are appointed, and the plain text of Subsection (1) which relates only to the

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<sup>9</sup> “States” is defined in the Compact to include the District of Columbia. HB 4156, art V.

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<sup>13</sup> *Id.*

<sup>14</sup> *Mich Coalition of State Employee Unions v Michigan*, 498 Mich 312, 331-332; 870 NW2d 275 (2015).

determination of election results in this state by boards of canvassers, not to determinations relating to federal elections determined by ballots cast by voters in other states.

***Agreements with Other States and No Alteration or Abrogation of Const 1963, art 3, § 5.***

The Michigan Legislature has broad authority to enter into agreements with other states under Const 1963, art 3, § 5, including the Compact. Subsection (1) cannot be interpreted in a manner that restricts that constitutional authority. Had the proponents of Proposal 22-2, which added Subsection (1) to the Michigan Constitution, intended to alter or abrogate in any way the power of the state to enter into agreements with other states under Const 1963, art 3, § 5, Michigan voters would have been required to be notified of that alteration or abrogation. They were not.

Proposal 22-2 informed Michigan voters that 20 separate sections of the Michigan Constitution were altered or abrogated. Const 1963, art 3, § 5 was not one of those provisions. Proposal 22-2 did not alter or abrogate the state's authority to enter into agreements with other states under Const 1963, art 3, § 5, leaving the authority under that provision unaffected. As a result, Subsection (1) cannot now be interpreted in a manner that restricts Const 1963, art 3, § 5. In other words, Subsection (1) does not restrict the state's broad authority to enter into agreements with other states, including the Compact.

***Federal Constitution Permits Legislature to use Compact as Manner of Selecting Electors***

Subsection (1) also cannot be interpreted in a manner to restrict the federal constitutional authority of the Michigan Legislature to determine the manner in which presidential electors are selected. US Const, art II, § 1, cl. 2 is clear:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors. . . .

This federal constitutional provision does not require or prohibit the use of any particular method for awarding the electoral votes of a state. As the United States Supreme Court has indicated:

The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket [the winner-take-all rule] nor that the majority of those who exercise the elective franchise can alone choose the electors. **It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method** of effecting the object.

. . .



**“In short, the appointment and mode of appointment of electors belong exclusively to the states** under the constitution of the United States.” [Emphasis added.]<sup>15</sup>

Under the federal constitution, the Michigan Legislature retains the right to enact laws determining the manner in which presidential electors are selected, including pursuant to the Compact. Both the Michigan Legislature and Michigan voters, acting on their own, lack the authority to amend the federal constitution. As a result, Subsection (1) cannot be interpreted in a manner inconsistent with this federal constitutional provision.

### **Compact Not Inconsistent with Plain Text of Subsection (1)**

Subsection (1) requires that the outcome of every election in Michigan be determined solely by the vote of electors casting ballots in the election. Nothing in the text of the Compact is inconsistent with this requirement.

Unlike all other elections held in Michigan, an election for president and vice-president is not solely an election in this state. It is also an election held in 49 other states and the District of Columbia. Votes cast by electors cast in each of the states—not just in Michigan—determine the outcome of a presidential election. When voting in Michigan elections, Michigan voters actually cast votes for presidential and vice-presidential candidates, not presidential electors.<sup>16</sup>

A review of the actual text of the Compact confirms that no provision of the Compact relating to the manner of appointing presidential elections is inconsistent with or prohibited by Subsection (1).

First, if the Compact is in effect for a presidential election, each member state must determine the number of votes cast for each presidential election in each state:

Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a “national popular vote total” for each presidential slate.<sup>17</sup>

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<sup>15</sup> *McPherson v Secretary of State*, 146 US 1, 27, 35; 13 S Ct 3 (1892) (interpreting a Michigan statute).

<sup>16</sup> Under current law a vote for a candidate is considered a vote for the set of electors chosen by the political party of the candidate. MCL 168.45. Under the Compact, the votes for be considered a vote for the “presidential slate,” which is defined to be the group as two persons nominated as candidate for president and a candidate for vice-president. HB 4156, art

<sup>17</sup> HB 4156, art III.

This determination of the national popular vote total under the Compact is not a determination of the outcome of an election in Michigan. As a result Subsection (1) would not apply to this determination.

Second, the Compact requires a designation of a national popular vote winner:

The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”<sup>18</sup>

This designation required by the Compact is a designation of the national popular vote winner in a national presidential election, not a determination regarding the outcome of an election in this state. Accordingly, Subsection (1) does not apply to this designation.

Third, once a national popular vote winner is determined, the Compact requires the appointment of presidential electors based upon the national popular vote winner:

The presidential elector certifying official of each member state shall certify the appointment in that official’s own state of the elector slate nominated in that state in association with the national popular vote winner.<sup>19</sup>

This certification of appointment is not the determination of the outcome of an election in Michigan. As a result Subsection (1) does not apply to this certification.

Fourth, the Compact requires each member state to certify votes for each slate of presidential candidates in the state:

At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.<sup>20</sup>

Under this provision, the number of votes cast for each presidential slate in Michigan is determined solely by the vote of electors casting ballots in a Michigan election. As a result, the determination under this provision of the Compact is consistent with and not prohibited by Subsection (1).

Finally, in the event of a tie for the national popular vote winner, the appointment of electors is determined certified based upon votes cast in Michigan by Michigan electors.

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<sup>18</sup> HB 4156, art III.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official's own state.<sup>21</sup>

The certification of the appointment of presidential electors under this provision of the Compact is determined based upon the outcome of an election in Michigan and also is consistent with the requirements of Subsection (1).

Based upon the foregoing, the text of the Compact is not inconsistent with the plain text of Subsection (1). If the Compact is in effect, the results of the election for president and vice-president will continue to be determined by ballots cast by voters in this state. Those results will be reported to other states. In the event of a tie, those results will be used to determine the individuals appointed as electors in Michigan. But, under the Compact, when there is not a tie in the national popular vote the results of the national popular vote will be used to determine the appointment of presidential electors in Michigan. Such an outcome is not prohibited by Subsection (1).

This interpretation of the text of Subsection (1) is consistent with the apparent intent of Michigan voters when adopting Subsection (1) as part of Proposal 22-2. None of the information provided by the sponsor of Proposal 22-2 indicates any intent to limit the ability of the State of Michigan to adopt the Compact. With regard to Subsection (1), the sponsor, Promote the Vote 2022, indicated only that "Promote the Vote 2022 requires canvassing boards to certify election results based only on the official records of votes cast."<sup>22</sup> Similarly, nothing in the summary of Proposal 22-2 as it appeared on the ballot indicates any intent to alter the manner in which presidential electors are selected in Michigan or restrict the ability of the State of Michigan to enter into the Compact. The summary indicates only that Proposal 22-2 would "[r]equire canvass boards certify election results based only on the official records of votes cast."<sup>23</sup> The Compact is simply not referenced by the sponsor of Proposal 22-2 or in the full text, or official summary, of the proposal.

### Conclusion

Subsection (1) does not restrict the adoption of the Compact in Michigan because: Subsection (1) cannot be interpreted in a manner that restricts the authority of the state to enter into

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<sup>21</sup> HB 4156, art III.

<sup>22</sup> Promote the Vote, *Frequently Asked Questions*, <<https://promotethevote2022.com/frequently-asked-questions/>> (accessed March 6, 2023).

<sup>23</sup> See exhibit D for the summary of Proposal 22-2 as appearing on the ballot.

Memo to National Popular Vote  
March 7, 2023  
Page 8

agreements with other states under Const 1963, art 3, § 5; Subsection (1) cannot restrict the Michigan's Legislature's authority under the federal constitution to determine the manner in which Michigan's presidential electors are appointed; and nothing in the plain text of the Compact is inconsistent with the plain text of Subsection (1).

If questions remain regarding the constitutionality of the Compact and any restrictions imposed by Subsection (1), those questions could be addressed by the Michigan Supreme Court in an advisory opinion pursuant to Const 1963, art 3, § 8.<sup>24</sup> Under this provision, either house of the Michigan Legislature, or the governor, may request an advisory opinion on important questions of law regarding the constitutionality of legislation after its enactment but before its effective date.

I trust that this information is helpful. Please let me know if you have any questions.

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<sup>24</sup> See exhibit E for the full text of Const 1963, art 3, § 8.

**EXHIBIT A**  
Const 1963, art 2, § 7

**STATE CONSTITUTION (EXCERPT)**  
**CONSTITUTION OF MICHIGAN OF 1963**

**§ 7 Boards of canvassers, certification of election results.**

**Sec. 7. (1) The outcome of every election in this state shall be determined solely by the vote of electors casting ballots in the election.**

(2) A board of state canvassers of four members shall be established by law. No candidate for an office to be canvassed nor any inspector of elections shall be eligible to serve as a member of a board of canvassers. A majority of any board of canvassers shall not be composed of members of the same political party. The legislature may by law establish boards of county canvassers.

(3) It shall be the ministerial, clerical, nondiscretionary duty of a board of canvassers, and of each individual member thereof, to certify election results based solely on: (1) certified statements of votes from counties; or (2) in the case of boards of county canvassers, statements of returns from the precincts and absent voter counting boards in the county and any corrected returns. The board of state canvassers is the only body or entity in this state authorized to certify the results of an election for statewide or federal office and to determine which person is elected in such election.

(4) If the certified results for any office certified by the board of state canvassers show a tie among two (2) or more persons, the tie shall be resolved and the winner certified by the drawing of lots under rules promulgated by the board of state canvassers. If the certified results for an office certified by a board of county canvassers show a tie among two (2) or more persons, the tie shall be resolved and the winner certified by such board of canvassers under procedures prescribed by law.

(5) The certification of any election results by the board of state canvassers shall be final subject only to (a) a post-certification recount of the votes cast in that election supervised by the board of state canvassers under procedures prescribed by law; or (b) a post-certification court order.

(6) A board of canvassers is authorized to conduct post-certification recounts of election results under procedures prescribed by law.

(7) For purposes of this section “to certify” means to make a signed, written statement.

**History:** Const. 1963, Art. II, § 7, Eff. Jan. 1, 1964 ;—Am. Init., approved Nov. 8, 2022, Eff. Dec. 24, 2022

**Former Constitution:** See Const. 1908, Art. III, § 9.

## EXHIBIT B

Const 1963, art 3, § 5

### STATE CONSTITUTION (EXCERPT) CONSTITUTION OF MICHIGAN OF 1963

#### § 5 Intergovernmental agreements; service by public officers and employees.

Sec. 5. Subject to provisions of general law, this state or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. Any other provision of this constitution notwithstanding, an officer or employee of the state or of any such unit of government or subdivision or agency thereof may serve on or with any governmental body established for the purposes set forth in this section and shall not be required to relinquish his office or employment by reason of such service. The legislature may impose such restrictions, limitations or conditions on such service as it may deem appropriate.

**History:** Const. 1963, Art. III, § 5, Eff. Jan. 1, 1964

**EXHIBIT C**  
US Const, art II, § 1, cl. 2  
**THE UNITED STATES CONSTITUTION (EXCERPT)**  
**ARTICLE II**

**Section 1.**

...

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

...

**EXHIBIT D**  
**Ballot Summary for Proposal 22-2**

**Proposal 22-2**

**A proposal to amend the state constitution to add provisions regarding elections.**

This proposed constitutional amendment would:

- Recognize fundamental right to vote without harassing conduct;
- Require military or overseas ballots be counted if postmarked by election day;
- Provide voter right to verify identity with photo ID or signed statement;
- Provide voter right to single application to vote absentee in all elections;
- Require state-funded absentee-ballot drop boxes, and postage for absentee applications and ballots;
- Provide that only election officials may conduct post-election audits;
- Require nine days of early in-person voting;
- Allow donations to fund elections, which must be disclosed;
- **Require canvass boards certify election results based only on the official records of votes cast.**

Should this proposal be adopted?

YES

NO



**EXHIBIT E**  
Const 1963, art 3, § 8

**STATE CONSTITUTION (EXCERPT)**  
**CONSTITUTION OF MICHIGAN OF 1963**

**§ 8 Opinions on constitutionality by supreme court.**

Sec. 8. Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

**History:** Const. 1963, Art. III, § 8, Eff. Jan. 1, 1964



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## MEMORANDUM

**To:** National Popular Vote  
**From:** Steven C. Liedel  
**Re:** House Bill 4156—National Popular Vote Interstate Compact and the Michigan Constitution  
**Date:** March 7, 2023

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### Question Presented

Does subsection (1) of section 7 of article II of the Michigan Constitution<sup>1</sup> (“**Subsection (1)**”) restrict the Michigan Legislature from enacting House Bill 4156 of 2023 (“**HB 4156**”) to enter into the National Popular Vote Interstate Compact (the “**Compact**”)?

### Brief Answer

No. Subsection (1) does not restrict the State of Michigan from entering into the Compact as provided under HB 4156 for at least three reasons:

- (1) the State of Michigan has broad authority not affected by Subsection (1) to enter into agreements with other states under Const 1963, art 3, § 5;<sup>2</sup>
- (2) the United States Constitution<sup>3</sup> vests the power in state legislatures to determine the manner in which presidential electors are selected and that authority is not restricted by Subsection (1); and
- (3) the plain text of Subsection (1) does not prohibit the State of Michigan from using the national popular vote winner in appointing presidential electors for Michigan consistent with the Compact.

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<sup>1</sup> See exhibit A for the full text of Const 1963, art 2, § 7.

<sup>2</sup> See exhibit B for the full text of Const 1963, art 3, § 5.

<sup>3</sup> See exhibit C for the full text of the relevant provision, US Const, art II, § 1, cl. 2.